

# The Law of Contract

Lecture 2

MGT 388

# Essential components of a valid contract

1. Offer (see lecture 1)
2. Acceptance
3. Consideration
4. Intention to create legal relations
5. Certainty



## 2. Acceptance

- Absolute and unequivocal<sup>明确的</sup>
  - “a final unqualified expression of assent to all the terms of an offer” (Trietel)<sup>同意</sup>
  - Any attempt to vary terms = counter-offer (not acceptance)
  - A counter offer kills the original offer - Hyde v Wrench (1840)
- Must be communicated
  - Mere silence is not sufficient (say nothing and do nothing)
  - Conduct (doing something) may be sufficient to constitute acceptance
  - Exception is the ‘postal rule’



## 2. Acceptance (cont.)

- An offer may be terminated at any point up until acceptance (Routledge v Grant)
- An offer will lapse after a 'reasonable' time <sup>失效</sup>
- An offer will lapse on the failure of a condition precedent
- An offer will lapse on the death of the offerer.... maybe!

# 3. Consideration

Consideration (对价) - 指一方为了获得对方的承诺而提供的利益、服务或承担的不利条件。它是合同有效性的必要条件之一，通常要求是有价值的事物，以此来表明双方都有承担义务。

- “The price one pays for another’s promise” – Pollock
- Not necessarily ‘cash’ - *Chapell v Nestle* (1960)

在法律意义上，有价值的对价可能包括某一方的某种权利、利益、利润或好处的增加，或者另一方的某种忍耐、损失或责任的承担”

- “A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other” *Currie v Misa* (1875)
- “An act or forbearance ... or the promise thereof” - Pollock
  - 必须是足够的，但不必要是相当的，即无需达到市场价值——因为合同是自愿订立的。
- Must be sufficient but not necessarily adequate – i.e. no need to be at market value – as contracts are entered voluntarily
  - i.e. can be good or bad bargain (unless adverse pressure is present)



# 3. No Consideration

过去的对价不是对价。  
履行现有公共职责通常不被视为对价。  
履行现有合同义务通常也不是对价。

以 *Stilk v Myrick* (1809) 和 *Hartley v Ponsonby* (1857) 的案例进行对比，关键差异是船员缺少的比例和与困难工作和危险相关的补偿，即并非仅仅是现有的义务。

但是在 *Williams v Roffey* [1990] 1 All ER 512 案件中，对价能够比我们最初想象的要复杂得多。这个案例与合同已经达成后条款的变更有关，而不是首次达成协议时的对价。

- ‘Past consideration is no consideration’
- Performance of an existing public duty - generally not consideration
- Performance of an existing contractual duty - generally not consideration
  - Contrast *Stilk v Myrick* (1809) and *Hartley v Ponsonby* (1857) – key difference was the proportion of the crew that were missing and the ramifications in relation to hard work and danger i.e. not merely an existing duty.
  - **BUT** *Williams v Roffey* [1990] 1 All ER 512 – consideration is capable of being far more subtle than we might at first think. This case related to the question of consideration in relation to variation of terms after a contract has been agreed, rather than the agreement in the first place.



# Exception to requirement for consideration

- Speciality contracts by deed
  - An exception to the requirement for consideration are contracts by deed (a document made under seal)
  - If a gift is made within a deed, it may be enforceable as what is known as a *speciality* (as opposed to a *simple*) contract
  - Contracts by deed are rare and very much the exception!

"Speciality contracts by deed" (契据专门合同) 是指一种特殊类型的合同。

它不需要通常合同所必须的对价 (consideration) 。

在这种合同中，某种形式的行为或承诺被正式写入并由当事人或其代表在法律见证下签署的文书中，这种文书通常称为“契据” (deed) 。

合同是否具有法律约束力部分取决于双方是否有意图让协议受到法律的管辖。

## 4. Intention to create legal relations

这个原则的实施意味着，虽然在商业交易中，法院通常假定双方是希望其协议有法律约束力的，但在家庭和社交环境中，通常假设个人之间的协议是不打算具有法律约束力的，除非有证据证明双方确实有这样的意图。这些假设是可以反驳的，也就是说，如果可以提供足够的证据来证明实际的意图与这些假设相反，法院将考虑这些证据。

客观评估

- Assessed objectively
  - Sensible as parties now in dispute
  - Court considers what arrangement looks like from the outside

法院将考虑从外部观察，协议看起来是否像是法律上的约定。

可反驳的推定

- Rebuttable presumptions - allows court to take a short cut/save resources
  - Business context = intention is presumed
  - Social/family context = no intention is presumed





## 5. Certainty

- The less certain the facts/law, the greater the likelihood of dispute
- Only certain types of contract are required to be in writing (e.g. land) but the more significant a contract the more sense there is in putting it in writing 只有某些类型的合同需要书面形式（例如土地），但合同越重要，书面形式就越有意义
- 'New Engineering Contracts' (NECs) provide uniform approach across the industry and so aid certainty
- Has performance of the contract begun?



# The contents of a contract

明示条款 (Express terms)

- Express terms – contained in the offer (the other party selects to accept, reject, or vary the terms by way of a counter offer)

默示条款 (Implied terms)

- Implied terms – court *may* retrospectively imply terms into a contract
  - Not simply to make contract 'fair' (impedes upon freedom of contract)
  - But will not imply a term if 'unfair' to do so

默示条款可以基于法律规定、合同双方的意图（即便未明确表达出来）、行业惯例、或为了使合同有意义而隐含地存在。它们是法院在考虑合同双方的行为和交易背景时可能推断出的条款。



# When will the court imply a term?

- Common practice in the geographical area or industry
- In light of consistent and repeated previous dealings
- The 'officious bystander' test - would it have been so obvious that a term had been assumed had we asked the question of the parties at the time that they concluded their agreement? - *Shirlaw v Southern Foundries* (1926).



# Exclusion & Limitation Clauses

- In addition to terms providing positive obligations, contracts may also include terms excluding or limiting liability
- Parties therefore may agree to exclude or limit liability for a parties action/inaction in certain set of circumstances – reflects voluntary nature of freedom of contract
- Excluding liability for negligence requires thought and a precise application of words.



# Restrictions on Exclusion & Limitation Clauses

- **Unfair Contract Terms Act 1977**

- Where the Act applies any attempt to exclude liability for death or personal injury resulting from negligence is prohibited (this doesn't just apply to contracts but would also extend to site notices etc.)

法律适用的情况下，任何试图排除因过失导致死亡或个人伤害的责任的尝试都是被禁止的

- In relation to other damage (i.e. not death/personal injury) the question may rest upon what is reasonable under the Act.

关于其他损害（即非死亡/个人伤害），问题可能取决于该法案下什么是合理的。



解除

# How a contract can be discharged

- Performance of contract
- By agreement of contractual parties
- Breach of contract 违反合同
- Frustration of contract 合同的挫败
- Contract is voidable due to conduct of a contracting party  
可撤销 行为

Discharge

